IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. OF 2007
{LODGING NO.236 OF 2007}
IN
CHAMBER SUMMONS NO.148 OF 2007
IN
EXECUTION APPLICATION NO.417 OF 2005
IN
AWARD DATED 25-6-2004

Surendra Kapoor,
permanently residing at
Flat No.1-B/502,
Pataliputra Nagar,
Oshiwara, Jogeshwari (W),
Mumbai-400 102. .... Appellant

- Versus -

Shri Prabir Kumar
Partner of M/s. Shree Ram
Pahwa Production, having
his office at 402,
St. Annes Apartment,
Pali Mala Road, Bandra (W),
Mumbai-400 050. .... Respondent

Shri Subhash Jha with Ms Laxmi Menon i/b
M/s. Law Global for the Appellant.

Shri Narayan Sahu i/b M/s. S.K. Shrivastav
& Co. for the Respondent.

CORAM: R.M.S. KHANDEPARKAR &
D.G. KARNIK, JJ.

DATED: MARCH 21, 2007

ORAL ORDER (Per R.M.S.Khandeparkar, J.):

1. Heard. This appeal arises from the order dated 6-3-2007 passed in Chamber Summons No.148 of 2007. By the impugned order, the Chamber Summons No.148 of 2007 taken out by the appellant has been dismissed. The said

chamber summons was taken out by the appellant raising the point that the award passed by the learned arbitrator was a nullity on the ground that the arbitrator could not have assumed powers of arbitrating the case in the absence of agreement between the parties to refer the dispute to arbitral Tribunal and that there was no such agreement between the parties.

2. Reliance was sought to be placed in the decisions of the Apex Court in the matters of **Bihar State Mineral Development Corporation and another v. Encon Builders (I) (P) Ltd.,** reported in (2003) 7 SCC 418, **Kiran Singh and others v. Chaman Paswan and others,** reported in MANU/SC/0116/1954 = AIR 1954 SC 340 and **K.K. Modi v. K.N. Modi and others,** reported in (1998) 3 SCC 573. Attention was also sought to be drawn to the decision of the Apex Court in the matter of **Srimathi Kaushalya Devi & others v. Shri K.L. Bansal,** reported in 1969 (1) SCC 59 and of the learned single Judge in the matter of **Pride of Asia Films v. Essel Vision,** reported in MANU/MH/1578/2003 = 2004 (5) Bom.C.R. 870. On the other hand, the learned Advocate appearing for the respondent, placing reliance in the decision of the Apex Court in the matter of **Krishna Bhagya Jala Nigam Ltd. v. G. Harishchandra Reddy and Anr.,** reported in MANU/SC/0705/2007 = JT 2007 (2) SC 447, submitted that in the absence of plea about absence of jurisdiction

being raised before the learned arbitrator, in view of Section 16(2) r/w Section 4 of the Arbitration and Conciliation Act, 1996, hereinafter called as "the said Act", the point of absence of such an agreement should be deemed to have been waived by the appellant and, therefore, the appellant is not entitled to raise such objection at this stage.

3. It is not in dispute that the appellant was a party to the proceedings before the arbitral Tribunal. It is also not in dispute that the appellant did not raise the point of absence of arbitration clause or absence of agreement between the parties to refer the dispute for arbitration either in the written statement filed by the appellant before the arbitrator or at any time in the course of the proceedings before the arbitrator. It is also undisputed fact that the award on being declared, same was sought to be challenged by the appellant by filing Arbitration Petition No.130 of 2006. The award was passed on 25-6-2004. The said arbitration petition was withdrawn by the appellant. It was only after issuance of the warrant of attachment of the property in the execution proceedings that the present chamber summons was sought to be taken out raising the point of nullity of the award on the ground stated above. The learned single Judge has rejected the said challenge and dismissed the chamber summons.

4. The provisions of law comprised under Section 16(2) of the said Act clearly provides that the plea that the arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of, an arbitrator. Further, Section 4 of the said Act provides that a party who knows that any provision of Part-I from which the parties may derogate, or any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

5. The Apex Court in **Krishna Bhagya Jala Nigam's** case (supra), dealing with the facts of the case where the plea of no agreement clause was not raised in the written statement filed by the party before the arbitrator, clearly ruled that by such conduct of the party it gave consent to the appointment of the concerned officer as an arbitrator and further that it is for the arbitral Tribunal to rule on its jurisdiction. Indeed, the law on this point is

well-settled and is abundantly clear from the statutory provisions comprised under Section 16(2) r/w Section 4 of the said Act.

6. A conjoint reading of both the provisions would reveal that the party having failed to raise the point of lack of jurisdiction or absence of any agreement between the parties to refer the matter to arbitration, proceeds to participate in the arbitration proceedings before the arbitral Tribunal, and the arbitral Tribunal declared the award on conclusion of arbitration proceedings, then such a party would be deemed to have waived his/her right to raise objection either to the jurisdiction or to the plea about the absence of agreement to refer the matter to arbitration. In the case in hand, once it is not in dispute that the appellant had not raised the issue about the absence of agreement between the parties to refer the matter to arbitration when the appellant appeared before the arbitral Tribunal and participated in the proceedings before the arbitral Tribunal, it is not open to the appellant to raise the said issue or to contend that the award on that count to be a nullity at this stage. Added to this, it is also a matter of record that the appellant had preferred an arbitration petition in terms of Section 34 of the said Act which was subsequently withdrawn. Obviously, the challenge to the award was

abandoned by the appellant. In such circumstances, it is not permissible for the appellant to contend that the award is a nullity and that too by taking out chamber summons in the execution proceedings filed by the party in whose favour the award was declared.

7. The decision of the Apex Court in **Encon Builders's** case (supra) and the para 13 thereof to which attention was drawn, reads thus:

> "13. The essential elements of an arbitration agreement are as follows:
>
> (1) There must be a present or a future difference in connection with some contemplated affair.
>
> (2) There must be the intention of the parties to settle such difference by a private tribunal.
>
> (3) The parties must agree in writing to be bound by the decision of such tribunal.
>
> (4) The parties must be ad idem."

The decision is not on the point in issue. The point in issue relates to the right of the party to challenge the award on the ground of absence of an agreement between the parties to refer the matter to arbitration in a case where the party had failed to raise such an objection by filing objection before the arbitrator. That was not the issue before the Apex Court nor the subject-matter of the decision in Encon Builders's case.

8. The decision in **K.K. Modi's** case (supra) and more particularly the para 17 thereof on which reliance was placed reads thus:

> "17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:
>
> (1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,
>
> (2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the

court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) that the tribunal will determine the rights of the parties in all impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal."

Mere reading of the para 17 quoted above would disclose that the decision is also not on the point in issue.

Firstly, the decision is in relation to a matter arising under the Arbitration Act, 1940. There was no provision similar to the provisions comprised under Section 16(2) r/w Section 4 of the said Act in the Arbitration Act, 1940. Being so, the ruling in para 17 cannot apply to the cases arising under the said Act. Besides, in the said case, the arbitrator had specifically framed an issue on the relevant point but had failed to decide the same.

9. In **Kiran Singh's** case (supra) and the para 6 thereof on which reliance was placed, reads thus:

> "6. **The answer to these contentions must depend on what the position in law is when a Court entertains a suit or an appeal over which it has no jurisdiction,** and what the effect of section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of

> jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non-judice, and that its judgment and decree would be nullities. The question is what is the effect of section 11 of the Suits Valuation Act on this position."
>
> (Emphasis supplied)

10. Plain reading of the said para would disclose that rather than supporting the contention on behalf of the appellant, it supports the view that we are taking in the matter, apart from the fact that the view which we are taking is in consonance with the law laid down by the Apex Court in **Krishna Bhagya Jala Nigam's** case. The Apex Court in Kiran Singh's case has clearly ruled that the point regarding jurisdiction of a Court would depend on the position in law as it exist when the Court

entertains the suit. Obviously, the jurisdiction of the arbitral Tribunal to entertain the disputes arose after the enforcement of the said Act. The said Act clearly provides that the point of jurisdiction has to be decided by the arbitral Tribunal itself in terms of Section 16 of the said Act. There being complete machinery provided under the said Act to deal with the aspect of jurisdiction and further when it specifically provides that the point of jurisdiction is to be raised at a particular stage by the party, and further in case on failure thereof it would result in waiver of such right by the party. The statutory provisions clearly provides that the point of jurisdiction is not only to be decided by the arbitral Tribunal but it has to be raised at the stage as specified under the said statutory provision and in the absence thereof the party looses the right to raise such an issue subsequently. In the case in hand, added to this aspect of the matter, the appellant had even filed an arbitration petition which was withdrawn.

11. The decision of the Apex Court in **Srimathi Kaushalya Devi's** case (supra) has absolutely no application to the case in hand. It is in relation to the provisions under the Delhi and Ajmer Rent Control Act, 1952. As far as the decision of the learned single Judge in the matter of **Pride of Asia Films** (supra) is

concerned, the law being well-settled by the Apex Court, we are not required to consider the said decision.

12. In the circumstances stated above, therefore, there is absolutely no case made out for interference in the impugned order passed by the learned single Judge.

13. Considering the fact that the law on the point of jurisdiction of the arbitral Tribunal to decide about its jurisdiction including the issue as to the existence or absence of an agreement between the parties to refer the matter to arbitral Tribunal being well-settled by the decision of the Apex Court, apart from the fact that the same is also clear from the statutory provisions comprised under Section 16(2) r/w Section 4 of the said Act, the learned Advocate for the appellant was asked as to whether the appellant would prefer to withdraw the appeal. However, the learned Advocate preferred to argue the matter at length insisting for a detail order in the matter. In the circumstances, we are compelled to observe that this appeal is nothing but waste of time of the Court and hence is liable to be dismissed with exemplary costs. Accordingly, the appeal is dismissed with costs of Rs.25,000/-. The costs shall be paid in the Registry within six weeks and on payment thereof, the same shall be credited to the account of the Maharashtra State Legal Services Authority.

14. At this stage, the learned Advocate for the appellant prays for stay of the warrant of attachment. In the facts and circumstances of the case, we do not find any case for stay of the order. The request is rejected.

(D.G.Karnik, J.) (R.M.S.Khandeparkar, J.)

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